No. 79-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL.,
Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* at 1a) is reported at 594 F.2d 48. The opinion of the district court (App. B, *infra,* at 18a) is reported only at 1978-1 Trade Cas. ¶ 62,130.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1979 (App. C, *infra,* at 25a). A timely petition for rehearing, with suggestion of rehearing *en banc,* was denied on July 6, 1979 (App. D, *infra,* at 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Act of State Doctrine permits a court of the United States to inquire into conduct of the Indonesian government for the purpose of determining the actual reasons and motives for official acts that precluded respondents, as a matter of law, from entering into a logging business on state-owned forests of Indonesia.[1]

STATEMENT

This lawsuit has its origin in the unsuccessful efforts by respondents, an American corporation and its two Hong Kong corporate subsidiaries, to obtain permission from the government of Indonesia to conduct a logging business in the province of Kalimantan.[2]

Indonesia's Foreign Capital Investment Act of 1967 makes ownership or co-ownership by an Indonesian entity a prerequisite to the conduct of a forestry operation on state-owned land. Foreign corporations that desire to operate in Indonesia can do so only by participating with a local firm in a joint venture approved by the government.

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[1] If the Court concludes that the Act of State Doctrine prohibits such judicial inquiry and determination, the Court therefore should dismiss respondents' antitrust claim in its entirety. *See* n. 8, *infra.*

[2] The case arises on motion for summary judgment. Except where otherwise noted, the statement of facts is taken from the opinions of the district court and the court of appeals.

In addition, since the state owns the nation's forest resources, no company can conduct a logging business on state-owned land until the government has issued it both a logging concession and a cutting license.

In 1970, P. T. Telaga Mas Kalimantan Co. ("Telaga Mas"), an Indonesian corporation, and Forest Products Corporation ("Forest Products"), the predecessor of respondent Industrial Investment Development Corporation, signed a joint venture agreement for the establishment of a logging business on certain designated state-owned land in Kalimantan. The Indonesian government approved the joint venture by entering into a three-party forestry agreement with Telaga Mas and Forest Products on July 1, 1971. The forestry agreement required the formation of a new Indonesian corporation (never formed in fact) to conduct the business of the joint venture, and the agreement further prescribed that such business could not begin unless and until a logging concession and cutting license were issued by the government.

Telaga Mas and Forest Products jointly applied for a concession and license, but while the application was pending a dispute arose among the shareholders of Telaga Mas. One group of shareholders opposed, and another supported, the joint venture with Forest Products. The group opposing the joint venture obtained judicial decrees from Indonesian courts affirming that group's right to control Telaga Mas and holding that the joint venture agreement was void. The Indonesian government then withdrew its approval of the joint venture by cancelling the forestry agreement. Respondents subsequently obtained a judgment invalidating the earlier decree that had voided the joint venture agreement, but the Indonesian government nevertheless refused to reinstate its approval of the joint venture

and also decided not to issue a logging concession or cutting license to the joint venture, but issued them instead to Telaga Mas alone.

After the Indonesian government had withdrawn its approval of the joint venture, respondents instituted this action in the United States District Court for the Southern District of Texas, charging that Telaga Mas and petitioners, a Japanese corporation and its American corporate subsidiary, had conspired in violation of American antitrust laws to prevent respondents from establishing the logging business pursuant to the joint venture agreement.[3] Respondents allege that petitioners fomented and encouraged the dispute among the shareholders of Telaga Mas, with the ultimate consequence that Forest Products lost the ability to enter and compete in the Indonesian lumber market. Respondents seek treble damages of approximately $195 million for the loss of profits that they allegedly would have derived from the operation of the logging business.[4]

The district court dismissed respondents' complaint on the ground that adjudication of their antitrust claim was barred by the Act of State Doctrine.[5] The district court determined that the direct cause of respondents' alleged injury was the Indonesian government's withdrawal of

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[3] The jurisdiction of the district court was invoked under the general federal question statute, 28 U.S.C. § 1331. In particular, respondents seek damages as provided by § 4 of the Clayton Act, 15 U.S.C. § 15, for alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and § 73 of the Wilson Tariff Act, 15 U.S.C. § 8. Respondents also allege diversity of citizenship jurisdiction under 28 U.S.C. § 1332 and assert pendent claims based upon state law.

[4] Second Amended Complaint, ¶¶ 59 and 60. Respondents seek an additional $130 million in damages pursuant to their nonfederal claims. *Id.*, ¶¶ 61 and 63.

[5] The claims based upon state law were dismissed on jurisdictional grounds.

its approval of the joint venture and refusal to issue a logging concession or cutting license. The court reasoned that to prove the fact of antitrust damage, essential under section 4 of the Clayton Act, respondents would be required to show that those acts of the Indonesian government had been induced by the alleged concerted acts of petitioners and Telaga Mas. Citing *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), the court ruled that the Act of State Doctrine does not permit such inquiry into the reasons or motives that may have induced the Indonesian government to act:

> [Respondents] contend that the poisoning of the [Forest Products]-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny [Forest Products] a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. . . .
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> . . . .
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> [Respondents] had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such a privilege. The motivation for their [*sic*] ultimate denial cannot be the basis of an antitrust suit pursuant to American laws.

App. B, *infra*, at 21a, 24a.

The United States Court of Appeals for the Fifth Circuit reversed, with one judge dissenting. Recognizing that under *Hunt* v. *Mobil Oil Corp.* proof of substantial damages would require a showing that the Indonesian government would have issued the necessary logging concession and cutting license *but for* the alleged conspiracy, the court acknowledged that such a showing could not have been made if the case had been brought in the Second Circuit. The court, however, explicitly rejected the *Hunt* decision and held that inquiry could be made into the reasons and motives underlying the Indonesian government's decisions to withdraw approval of the joint venture, to refuse to reinstate such approval, and to withhold issuance of the necessary logging concession and cutting license:

> . . . [T]he *Hunt* opinion broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the foreign state and 'that inevitably involves its validity.' 550 F.2d at 77.
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> . . . [W]e disagree that motivation and validity are equally protected by the act of state rubric. . . . Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.

App. A, *infra*, at 15a-17a (emphasis in original).

Judge Jones, dissenting, stated:

> The district court's decision as succinctly and accurately stated in the majority opinion, is 'that the dam-

> age complained of stems directly from the denial of the government concession to cut timber.' I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

App. A, *infra,* at 17a.

REASONS FOR GRANTING REVIEW

1. The holding below, that courts of the United States may inquire into and determine the extent to which a foreign government's official acts may have been induced or caused by alleged antitrust violations, is in conflict with the recent decisions of the Second and Ninth Circuits in *Hunt* v. *Mobil Oil Corp.* and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.* and is inconsistent with the principles that this Court enunciated in *American Banana Co.* v. *United Fruit Co.,* 213 U.S. 347 (1909). By departing from established precedent, the court of appeals has created substantial confusion and uncertainty concerning an important question of federal law that previously had been regarded as settled. This Court should grant review in order to resolve the conflict among the circuits and to clarify the scope and proper application of the Act of State Doctrine in cases where, as here, the basis for a foreign government's official acts has been called into question.[6]

Whether American courts may inquire into and determine the reasons and motives underlying a foreign government's official acts is a question of substantial importance

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[6] When *Hunt* was pending on petition for a writ of certiorari, this Court invited the Solicitor General to file a brief *amicus curiae* stating the views of the United States. 432 U.S. 904 (1977). The Solicitor General advised the Court that it should take the case to decide "the important issue whether the act of state doctrine bars judicial examination of the motives behind a foreign government's official acts." Brief for the United States as Amicus Curiae, at 7 (No. 76-1403).

both to the conduct of this nation's foreign policy and to the administration of the antitrust laws. American corporations engage in widespread business activities throughout the world, and foreign governments have assumed an ever-expanding role as regulators of and participants in such activities. It is apparent and inevitable that private antitrust actions arising from international business activities will increasingly implicate the official acts of foreign states. In view of the decision below, the lower courts stand in need of this Court's guidance concerning whether they are free to scrutinize the wisdom, integrity, motivation, or propriety of such official acts.

2. In this case, respondents seek almost $200 million for the loss of profits that they allegedly would have derived from the joint operation of a logging business with Telaga Mas in Indonesia. As the court of appeals itself observed, respondents cannot recover damages for such lost profits without first showing that the Indonesian government would have allowed them to conduct the proposed logging business *but for* petitioners' alleged wrongdoing: "Plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered." App. A, *infra*, at 16a.[7] Accordingly, in order to establish their case, respondents must prove that petitioners' actions, and not respondents' lack of business acumen or political, economic, or any other factors, were the cause of or reason for the government's withdrawal of approval of the joint venture, its refusal to reinstate that approval, and its failure to issue the necessary logging concession and cutting

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[7] *See also, e.g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931) (recoveries may be had only for injuries that are "the certain result of the wrong"); M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1064 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976) ("damages are recoverable only upon a showing that absent the anticompetitive practice plaintiff would not have suffered the loss").

license.[8] As the court of appeals recognized, adjudication of this factual issue of causation would require a thorough inquiry into the reasons or motives underlying the Indonesian government's aforementioned acts of state.

It is precisely this type of judicial inquiry that the courts in *Hunt* and *Occidental Petroleum* held to be barred by the Act of State Doctrine. The factual issue in *Hunt* was whether the defendants' alleged wrongdoing had induced or caused the government of Libya to nationalize the plaintiffs' petroleum properties in that country. 550 F.2d at 72.[9] The Second Circuit, in a carefully reasoned opinion, determined that the Act of State Doctrine precluded the examination into the motives of the Libyan government that would be required to resolve that issue. Similarly, in *Occidental Petroleum* the Ninth Circuit concluded

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[8] The court of appeals apparently believed that respondents may be able to prove they suffered injury upon the collapse of the joint venture between Forest Products and Telaga Mas, even apart from the alleged loss of profits. App. A, *infra*, at 13a-14a. But since the joint venture had no business purpose other than the establishment of the proposed logging operations in the particular concession area in question (*see, e.g.*, R. Doc. No. 28), the joint venture had no value apart from the profits to be derived from those particular proposed operations. Proof that petitioners' alleged wrongdoing was the proximate cause of the failure to reap profits therefore is not merely necessary to the recovery of substantial damages, it is a prerequisite to the recovery of any damages at all.

[9] The plaintiffs in *Hunt*, like respondents here, asserted that their injury was independent, and in advance, of any act of state:

> The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises that were made to be broken. They damaged Hunt wholly apart from the nationalization, and if the final coup de grace was administered by Libya, it was because of the manner in which respondents manipulated the conduct — not of the Libyan government — but of their fellow signatories. . . .

Petition for a Writ of Certiorari in *Hunt*, at 24-25 (No. 76-1403).

that the Doctrine barred inquiry into the question whether allegedly unlawful actions of the defendants had caused the ruler of Umm al Qaywayn to cancel or suspend a petroleum drilling concession that he had earlier granted to the plaintiffs.[10] These decisions plainly are at odds with the holding below. Indeed, although the court of appeals in this case sought to distinguish *Occidental Petroleum*,[11] it openly disagreed with and rejected *Hunt*. App. A, *infra*, at 16a-17a.[12]

In deciding *Hunt* and *Occidental Petroleum*, the Second and Ninth Circuits correctly drew substantial support from this Court's decision in *American Banana Co.* v. *United Fruit Co.* In that case, the plaintiff alleged that its property had been seized and sold by the government of Costa Rica as a result of the defendant's unlawful actions. This Court held that the courts of the United States lack power to determine that a foreign act of state was improperly or unlawfully induced:

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[10] The relevant facts in *Occidental Petroleum* are set forth in that district court's opinion. 331 F. Supp. at 99-101.

[11] The court attempted to distinguish *Occidental Petroleum* as a case "where plaintiffs' asserted claim arose through rights granted by a foreign government." App. A, *infra*, at 13a. But the fact that *Occidental Petroleum* involved the suspension or cancellation of a privilege, whereas this case involves the refusal to extend or perfect a privilege in the first place, affords no basis for treating the two cases differently under the Act of State Doctrine.

[12] Although *Hunt* involved an expropriation of property that had been the occasion for official comment by the Department of State, the court of appeals below correctly recognized that the cases are basically the same "[d]espite these distinctions." App. A, *infra*, at 15a. The Second Circuit itself stated that its holding in *Hunt* would have been the same "[e]ven if the Department of State had not spoken." 550 F.2d at 78. And for purposes of the Act of State Doctrine, there can be no significant difference between a foreign state's expropriation of a firm's property and its refusal to permit a firm to engage in business: Both the taking of property and the exclusion from the marketplace constitute official acts of the foreign state.

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.

213 U.S. at 358.[13] It follows that there is no room for judicial inquiry into the question of inducement at all.

3. Even apart from *American Banana, Hunt,* and *Occidental Petroleum,* it is clear that the court of appeals below erred in its application of the Act of State Doctrine.[14] That doctrine is grounded in the concern that judicial examination of foreign acts of state may affront or embarrass the foreign sovereign and thereby frustrate or interfere with this nation's conduct of foreign policy. *See, e.g., First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S.

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[13] The Court further held that this nation's antitrust laws do not reach private acts committed outside the United States, a holding that has not withstood the test of time. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962). But "the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." *Occidental Petroleum,* 331 F. Supp. at 110. *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (citing *American Banana* with approval as a case involving the Act of State Doctrine).

[14] The Indonesian government's withdrawal of approval of the joint venture, its refusal to reinstate that approval, and its failure to issue a logging concession and a cutting license were discretionary official acts implicating that nation's public interests. As the Chairman of the Indonesian Foreign Investment Board has explained, the dispute in this case "directly concerns the interest of the State in the form of a forest area which is strictly necessary to be protected." R. Doc. No. 68. It therefore is clear that the acts at issue were acts of state.

759, 765-68 (1972) (plurality opinion). The rationale of the Act of State Doctrine therefore is not confined merely to judicial determinations of the validity of the foreign act of state. Judicial inquiry into the actual reasons or motives underlying an act of state carries with it an equal if not greater potential for affronting or embarrassing the foreign sovereign. Such an inquiry, which calls into question the wisdom, judgment, probity, and consistency of foreign officials, may be considerably more disturbing to the foreign sovereign, and considerably more disruptive of foreign policy, than a simple declaration that, for example, the foreign act of state does not comport with western concepts of international law. *Cf. Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 428-30.[15]

Moreover, it is apparent that the distinction drawn by the court of appeals between validity and motivation is wholly artificial.[16] Since official acts that have been procured by fraud or that have no basis in reason, for example, may be unenforceable under local or international law, the

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[15] Since the inquiry into motivation itself creates a serious risk of affront or embarrassment, it makes no difference under the Act of State Doctrine why the inquiry is undertaken. In particular, the considerations underlying the Act of State Doctrine operate with equal force irrespective of whether the judicial examination of a foreign act of state be made to establish the fact, or only the amount, of a defendant's liability. The court of appeals' unexplained suggestion to the contrary, App. A, *infra,* at 13a, 17a, appears plainly incorrect.

[16] Even the seminal Act of State case, Underhill v. Hernandez, 168 U.S. 250, 252 (1897), speaks not of "validity" but against our courts' "sit[ting] in judgment" on the acts of a foreign state. The most recent Act of State opinion by this Court, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 n. 10 (1976), interprets *Underhill* as speaking to the "propriety" of foreign governmental acts, not their "validity."

motivation of an act of state obviously bears upon its validity.[17]

For all these reasons, the court of appeals was wrong to restrict the operation of the Act of State Doctrine solely to cases where the validity of a foreign official act is in question. The Doctrine operates more broadly to prevent American courts from "challeng[ing] the *sovereignty* of another nation, the *wisdom* of its policy, or the *integrity* and *motivation* of its action." *Timberlane Lumber Co.* v. *Bank of America,* 549 F.2d 597, 607 (9th Cir. 1977) (emphasis added).

The real issue in any case involving a foreign act of state is not whether the act is valid but, rather, whether the act is to be accepted as a postulate for resolution of the dispute between the parties. On that point, this Court has spoken plainly and forcefully: "When it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud* v. *American Metal Co.,* 246 U.S. 304,

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[17] The Second Circuit in *Hunt* reached the same conclusion:

> However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity.
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> . . . [W]e cannot logically separate Libya's motivation from the validity of its seizure. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

550 F.2d at 77.

309 (1918).[18] It follows that, in this case, the denial of a logging concession and a cutting license and other related acts by the government of Indonesia, and respondents' consequent legal disability, must be taken as a predicate for decision. The government of Indonesia by its acts foreclosed any legal interest that respondents might otherwise have had in conducting a logging business in that country. Under the Act of State Doctrine, therefore, as a matter of law respondents cannot recover directly or indirectly for the loss of profits that they allegedly would have derived from such a business.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[18] *See also* Underhill v. Hernandez, 168 U.S. at 252; Occidental of Umm al Qaywayn v. A Certain Cargo, 577 F.2d 1196, 1202 n. 10 (5th Cir. 1978), *cert. denied* ..... U.S. ....., 99 S.Ct. 2857 (1979).

APPENDIX A

OPINION

Of the

United States Court of Appeals
For the Fifth Circuit

April 25, 1979

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., AND FOREST PRODUCTS CORPORATION, LTD.,
Plaintiffs-Appellants,

v.

MITSUI & CO., LTD., AND MITSUI & CO. (U.S.A.), INC.
Defendants-Appellees.

No. 78-1775

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

APRIL 25, 1979

Fitzhugh H. Pannill, Jr., R. Hayden Burns, Houston, Tex., for plaintiffs-appellants.

Fulbright & Jaworski, B. J. Bradshaw, Rufus Wallingford, Jerry E. Smith, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, CLARK and INGRAHAM, Circuit Judges.

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CHARLES CLARK, Circuit Judge:

The sole issue in this appeal is whether the act of state doctrine precludes a trial of plantiffs' antitrust action.[1] Plaintiffs claim damages from Mitsui & Co., Ltd., a Japanese corporation, and its American subsidiary, Mitsui & Co. (U.S.A.), Inc., for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 & 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C.A. § 8. The complaint appended state law claims of tortious interference with contractual relations against these defendants and a breach of contract charge against the Indonesian defendant, P. T. Telaga Mas Kalimantan Co. Following extensive discovery, the district court granted defendants' motion for summary judgment. Defendants urged their motion on five grounds: (1) plaintiffs lack standing since they have incurred only derivative damage as shareholders; (2) the extraterritorial reach of American antitrust laws cannot grasp this case; (3) plaintiffs are not within the "target area" of antitrust law protection; (4) forum non conveniens; (5) act of state doctrine. The district court's decision was based solely on the ground that the act of state doctrine prevented judicial review of the federal claims.[2] Because of its ruling on federal claims, the district court exercised its discretion to dismiss the pendent state claims.[3]

The district court's invocation of the act of state doctrine

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[1] The named plaintiffs in this action are Industrial Investment Development Corporation (an American Corporation) and its two Hong Kong corporate subsidiaries, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd. They are collectively referred to as Industrial Investment or plaintiffs throughout this opinion.

[2] We express no opinion on the merits of assertions (1)-(4).

[3] Plaintiffs argue that independent diversity jurisdiction exists for the state claims. Because we find the federal claims justiciable, we need not resolve the dispute over the proper interpretation of the federal diversity statute, 28 U.S.C.A. § 1332.

in this case was in error. Although the regulations of a foreign state, Indonesia, formed part of the background to the activities alleged, neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

The present dispute evolves from plaintiffs' desire to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. Late in the 1960's, the government of Indonesia began developing a plan for encouraging and regulating foreign private capital investment. The consequent Foreign Capital Investment Act provided for restrictions of private investment in certain fields, required the development of Indonesian manpower, and required opportunities for Indonesian co-ownership. Thus a foreign company could not conduct business within that country until it joined with a local company, and they together organized an independent limited liability company under Indonesian law. Known as P.T.'s (Perseroan Terbatas), these companies, which are closely analogous to American corporations, must have their organization approved by the government before they become effective.

Land use is also subject to regulation under the Act. A properly organized P.T. cannot harvest timber from the state-controlled land until it has been granted a concession and cutting license by the Department of Forestry pursuant to an application for forestry exploitation rights. The procedure contemplates preliminary surveys and negotiations between the applicant and the Director General of Forestry resulting in tentative concession rights embodied in a Forestry Agreement. The Agreement, accompanied by an

Application Letter drafted by the P.T., is then to be submitted to the Minister of Agriculture within one month. Delay in submitting the Application Letter is considered grounds for revoking the Forestry Agreement. The Agreement and Letter must be channeled through the Department. Following approval and payment of a concession fee, the Director General of Forestry issues a formal concession decree and a license which establishes the new company and authorizes its logging operations, subject to revocation for failure to carry out its obligations under the Forestry Agreement. Harvesting cannot begin until the license has been issued.[4]

In 1970 Industrial Investment[5] signed a joint venture agreement with Telaga Mas to harvest logs from a timber concession which had been granted to Telaga Mas in a government forest in Borneo. Under the agreement, Industrial Investment was to provide equipment, capital requirements and management, and supervisory and technical personnel. In exchange, Telaga Mas expressly agreed to cooperate in obtaining the necessary approvals for establishing the P.T. and securing the formal concession decree and cutting license.

Throughout the first six months of 1971 plaintiffs and Telaga Mas jointly negotiated with the Indonesian government for its approval of the proposed business. As a result, a Forestry Agreement was signed by the two companies and the Director General of Forestry on July 1, 1971. The Agreement set forth the capital, organization, and

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[4] *See generally*, Republic of Indonesia, *Invest in Indonesia* (January 1972).

[5] Forest Products Corporation of Delaware, a predecessor company of Industrial Investment, conducted the initial negotiations. For clarity we refer to the American company as Industrial Investment throughout.

administrative requirements to be completed by the two firms before payment of the concession fee to the government and issuance of the cutting license to the newly formed P.T. The Agreement also contained provisions relating to the operation of the joint concession. More importantly, it reserved to the Department of Forestry the right to cancel for failure of the joint venture partners to cooperate or carry out their duties, and provided that cancellation of the joint venture agreement prior to the issuance of the license certificate would automatically terminate any rights of the parties to conduct lumbering operations. No license ever issued.

The district court refused to consider plaintiffs' allegations of a Sherman Act conspiracy since in its opinion the absence of an authorizing license governed the disposition of the case. Plaintiffs allege that the Mitsui defendants infiltrated and usurped control of the Telaga Mas management for the purpose of destroying plaintiffs' interest in the proposed logging concession. The complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies, past purchasers and creditors of Telaga Mas, decided first to eliminate Industrial Investment and then to protect its competitive edge by secretly taking direct supervision and control of the Telaga Mas operations for its own profit. Implementation of the scheme began when a shareholder group led by Harianto, a Telaga Mas official who was secretly backed by Mitsui, challenged the authority of Telaga Mas official [*sic*], Sadjarwo, to execute the Forestry Agreement on behalf of Telaga Mas. Separate competing shareholder meetings were held by Harianto and Sadjarwo, each affirming the corporate authority of the leader of its respective faction. Eventually an Indonesian court declared Harianto's group to

be properly in power and nullified the joint venture agreement.

When the news reached the Director General of Forestry, he sent a letter to plaintiffs and to Telaga Mas in which he "cancelled and affirmed invalid" the Forestry Agreement. In the same letter, he invited plaintiffs and Telaga Mas under its newly declared leadership to execute a new agreement. The cancellation, plaintiffs argue, was the natural operation of the Agreement's automatic termination provisions.

In a separate action, a second Indonesian court subsequently held that Industrial Investment was not bound by the nullification order since it was not a party to that action. Harianto continued to rule Telaga Mas, however, and refused to honor or participate in the joint venture with plaintiff.

Industrial Investment contends that defendants' poisoning of the joint venture caused the cancellation of the Forestry Agreement which in turn caused the government to deny the concession. The district court found that the act of state doctrine prohibited such a "two-step inquiry." It concluded: "Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review."

The act of state doctrine has arisen as a means of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. As classically stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

Early application of this doctrine was often muddled with the doctrine of sovereign immunity or principles of conflicts of law.[6] Since *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), however, the doctrine has emerged as independently based on concerns of separation of powers. The *Sabbatino* Court, cautious of judicial interference in executive affairs, refused to adjudicate the validity of expropriation by the Cuban government of property within its own territory owned by American nationals.[7] Its decision was based on several factors which pointed to the executive branch as the more appropriate tribunal to deal with the sensitive political issues. All related [*sic*] to the possible adverse consequences of an American court [*sic*] attempting to resolve the validity of title to property not within its jurisdiction

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[6] In *Underhill*, for instance, the defendant Hernandez was acting as an agent for the sovereign [*sic*] in which the alleged torts occurred. Thus the result could be said to rest on the personal immunity of foreign sovereigns. *Note*, The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). *See also, Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 705 n. 18, 96 S.Ct. 1854, 1866-67 n. 18, 48 L.Ed.2d 301 (1976). There is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity. See Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977).

[7] Although *Sabbatino's* bar against claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the "Hickenlooper Amendment," Foreign Assistance Act § 301(d)(4), 22 U.S.C.A. § 2370(e)(2) (1970), the case is still the leading authority on the act of state doctrine.

or to judge a foreign state's power to expropriate the property of aliens. Of significance is the Court's express refusal to lay down "an inflexible and all-encompassing rule" of judicial abstention in every case not totally isolated to this country. 376 U.S. at 428, 84 S.Ct. at 940. Instead, it declared a less brittle doctrine, one with the "capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-28, 84 S.Ct. at 940. Relying on traditional political question reasoning, it found that the doctrine was not constitutionally compelled but that it rested on "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." 376 U.S. at 423, 84 S.Ct. at 938.[8] *Sabbatino's* "proper distribution" depended on several factors, which concerned the ramifications of judicial intervention on executive conduct of international relations or of inconsistent judicial and executive behavior.

The Supreme Court has recently reaffirmed this policy of balancing executive and judicial concerns in *Alfred Dunhill of London* v. *Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Because the Court "decline[d] to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," *Dunhill* has become known as the "commercial

[8] Recently this circuit refused to rule on an act of state defense in a suit presenting conflicting claims to oil extracted from the *Persian Gulf. Occ. of Umm al Qaywayn* v. *A Certain Cargo,* 577 F.2d 1196 (5th Cir. 1978). Because the action required a determination of sovereignty over the well area, the case was dismissed as a non-justiciable political question. In a brief discussion of the source of the act of state doctrine, we noted that the "better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." 577 F.2d at 1200-01 n. 4.

exception" to the act of state doctrine. Dunhill had mistakenly made an overpayment to Cuba for cigars purchased from expropriated cigar businesses. The Court permitted adjudication of his claim of debt against Cuba:

> [S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. . . . Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04, 96 S.Ct. at 1866 (footnote omitted). Industrial Investment has urged application of this "commercial exception" to the Indonesian licensing structure. We need not reach the merits of this contention.[9]

Situations have arisen in which the Supreme Court has found the involvement of a foreign state to be too insignificant to invoke the act of state doctrine. For instance, the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts. In *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1926), a conspiracy which affected United States commerce was held not to be immune from judicial review

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[9] A majority of the Court never supported a broad "commercial act" exception to the act of state doctrine. Justice Stevens specifically omitted this part in his concurrence to Justice White's majority opinion, and it was rejected by the four dissenters. However, the Second Circuit, at least in dictum, has treated a commercial exception as firmly established. *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed. 2d 477 (1977). *See* Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 Fordham L.Rev. 295 (1977).

of Sherman Act claims even though its success was due in part to procurement of discriminatory foreign legislation. The Court distinguished an earlier antitrust case, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), in which the act of state doctrine was held to bar adjudication of claims that defendants had influenced Costa Rica to seize plaintiff's property. *American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States* v. *Sisal Sales Corp.*, *supra*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042; *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

The conspiracy in *American Banana* took place outside the United States and resulted in Costa Rica's seizure of plaintiff's property there. The seizure was valid in costa [*sic*] Rica and the Court held that its validity could not be challenged in American courts. The *Sisal* conspiracy, by comparison, allegedly destroyed plaintiff's sisal exportation business, not by government expropriation, but by the American corporate defendants' takeover aided by foreign legislation. The *Sisal* Court was not interested in the validity of the legislation but was concerned with redressing the anticompetitive effects on American commerce caused by the conspiracy.

Similarly, a stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), defendants were charged

with conspiring to monopolize the American vanadium industry by currying the favor of a private Canadian corporation designated as exclusive purchasing agent of vanadium by the Canadian government. Drawing from the authority of *Sisal,* the Court rejected the defense that the Canadian law permitted discriminatory purchasing by the authority having power to designate purchasing agents. It was enough that plaintiff claimed that the loss of its business was caused by defendants' actions. The Court was careful to note that the Canadian government itself was not a defendant in the action and that the validity of its legislation was not in issue.

The participation of the Indonesian government in the context of the present analysis cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad.[10] As in *Sisal* and *Continental Ore,* the complaint charges parties subject to the court's jurisdiction with conduct occurring within this country and elsewhere which violates United States law. To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license. To protect American antitrust policies, an American court

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[10] In cases dealing with the enforcement of antitust laws in the face of state action, we note that the approach of the courts has been to weigh the relative interests of the state and federal governments to determine whether the anticompetitive harm of the activity outweighs the benefits of state regulation. *Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

need not embark on an adjudication of the validity of that government's behavior. The Ninth Circuit recently stated:

> The touchstone of *Sabbatino* — the potential for interference with our foreign relations — is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino,* 376 U.S. at 423, 84 S.Ct. 923. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino, id.* at 428, 84 S.Ct. at 940, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

Timberlane Lumber Co. v. *Bank of America,* 549 F.2d 597, 607 (9th Cir. 1976).

The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right-to-ownership cases such as *American Banana* and *Sabbatino.* For instance, in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.,* 331 F.Supp. 92 (D.C. Cal.1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972), the plaintiffs, holders of a Middle East oil concession from one of the Trucial States, charged the defendants with inducing an adjacent sheikdom in the Persian Gulf, Sharjah, to grant them a conflicting concession covering the same area. The court invoked the act of state doctrine to avoid having to adjudicate which of the two competing sheikdoms had superior authority to grant the concession. It was found that, to establish their claim as pleaded, plaintiffs had to prove that Sharja's [*sic*] concession was fraudulently issued. Passing upon such foreign governmental acts was considered more appropriate for the executive branch in

its handling of foreign relations. By comparison, resolution of the charges made by Industrial Investment does not require a determination of plaintiffs' right to receive a cutting license from the Indonesian government. Unlike *Occidental* where plaintiffs' asserted claim arose through rights granted by a foreign government, Industrial Investment's interest in its business venture with Telaga Mas may be protected from disruptive conduct of competitors by United States antitrust laws.

The only connection which the government of Indonesia has with this action is through application of its Foreign Investment Act, the validity of which is not questioned. The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens. We need not decide whether, had Telaga Mas not refused to cooperate, the license would have issued as a certainty. It is enough that plaintiffs have offered proof to show that defendants conspired to cause its potential to exploit the Borneo concession to die aborning. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *H & B Equipment Co., Inc.* v. *International Harvester*, 577 F.2d 239 (5th Cir. 1978); *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction.

But the Mitsui defendants argue (and the district court agreed) that the damage complained of stems directly from the denial of the government concession to cut timber. In order to establish therefore that defendants' behavior

caused the injury, it would be necessary for the court to investigate the Director of Forestry's motivation in canceling the agreement. This they say amounts to a prohibited inquiry into the validity of governmental activity. However, plaintiffs' complaint does not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber. They assert: "The wrongful acts of Defendants and their co-conspirators have deprived it of its contract and concession rights, of its ability to enter and compete in the market, and of the profits it would have derived from such operations." They insist here that even before it was known whether a license would issue, these rights had a substantial value which they could have proven. Plaintiffs are entitled to recover damages for injury to these "business or property" interests if they are caused by antitrust violations. 15 U.S.C.A. § 15. All the injuries contended for may potentially satisfy that description. *North Texas Producers Association* v. *Young,* 308 F.2d 235 (1962), *cert. denied,* 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963). *See Hunt* v. *Mobil Oil Corp.,* 410 F.Supp. 10 (S.D.N.Y.1976), *rev'd on other grounds,* 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977).

The authority asserted to support Mitsui's position is *Hunt* v. *Mobil Oil Corp.,* 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.,* 331 F.Supp. 92 (C.D.Cal.1971), *aff'd,* 461 F.2d 1261 (9th Cir. 1972). Both cases involved expropriation by a foreign state of plaintiffs' properties. This distinction alone is of major significance. The *Hunt* court itself, refusing to apply the precedent of *Sisal,* stated:

> [*Sisal*] considered the assistance of the sovereign through the mechanism of favorable legislation engi-

> neered by the defendants to be of considerably less moment than the expropriation by the state of the plaintiffs' properties in [*American Banana*].

550 F.2d at 75. Furthermore, separation of powers consideration in *Hunt* strongly counselled against the court's interference.[11] Despite these distinctions, the *Hunt* opinion broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the

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[11] The complaint by Hunt, an independent oil producer holding oil concessions in Libya, charged defendants, the seven major oil companies, with fraudulently inducing Hunt to be uncooperative in pricing negotiations with Libya. Hunt did so, and Libya retaliated by nationalizing Hunt's properties thus totally eliminating Hunt from the field of competition. Libya was incensed. It loudly proclaimed its purpose to give the United States "a big hard blow in the Arab area on its cold, insolent face." 550 F.2d at 73 *quoting* Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-17 (1974). In response, the United States government wrote the Libyan government and characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." 550 F.2d at 73, *quoting*, A. Rovine, Digest of United States Practice in International Law 1973 at 335. The Second Circuit refused to upset the executive's identification of Libya's motivation by another inquiry which "could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." 550 F.2d at 77-78.

The court found that, even if the Department of State had not openly expressed its position, the political and diplomatic dimensions were too burdensome for resolution by the judiciary: "The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 550 F.2d 78. No such "implications and complications" hinder a resolution of Industrial Investment's antitrust claims here.

foreign state and "that inevitably involves its validity." 550 F.2d at 77.

This broad language in *Hunt* has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act in their anticompetitive scheme.[12] We do not agree that, in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's [*sic*] acts were the sole cause of the injury. Of course, plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered. *Radiant Burners, Inc.* v. *Peoples Gas,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed2d 358 (1961). However, inquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; *E & B* [*sic*] *Equipment Co., Inc.* v. *International Harvester, supra,* 577 F.2d 239; *Heatransfer* v. *Volkswagenwerk, A.G., supra,* 553 F.2d 964. Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. *See, e. g., Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* 370 U.S. 705, 82 S.Ct. 1404; *Timberlane Lumber Co.* v. *Bank of America supra,* 549 F.2d 597. Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to

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[12] Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977); Note, the Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978).

executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective. The courts are an important forum for protection against competitive restraints. Although the act of state doctrine is a vital rule of judicial abstention in the field of foreign relations, it does not apply in this case.

REVERSED and REMANDED.

JONES, Circuit Judge, dissenting:

The district court's decision as succinctly and accurately stated in the majority opinion, is "that the damage complained of stems directly from the denial of the government concession to cut timber." I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

APPENDIX B

OPINION
Of the
United States District Court
For the
Southern District of Texas

February 28, 1979

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL

V.

MITSUI & CO., LTD., ET AL

CIVIL ACTION No. 75-H-1041

Butler, Binion, Rice, Cook & Knapp (Louis Paine), Houston, Texas, and Austin, Arnett, Northrop, Kirkpatrick & Steber (Fitzhugh H. Pannill, Jr.), Houston, Texas, attorneys for Plaintiffs.

Fulbright & Jaworski (B. J. Bradshaw), Houston, Texas, attorneys for Defendants Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc.

FEBRUARY 28, 1978

MEMORANDUM AND ORDER:

This is an antitrust action brought in United States District Court to rectify alleged commercial mischief abroad. Defendants have moved to dismiss this action on five grounds:

(1) Plaintiffs lack standing since they have incurred only derivative damage as shareholders;

(2) The extraterritorial effect of American antitrust laws does not extend so far as to reach this case;

(3) Plaintiffs are not within the "target area" of protection afforded by the antitrust laws;

(4) Forum Non Conveniens;

(5) Act of state doctrine.

From a study of the pleadings, and with the benefit of seven volumes of exhibits accompanying the exhaustive briefs of parties, it is the opinion of this court that the act of state doctrine precludes judicial review of this case, therefore the other prongs of Defendants' motion need not be reached. Plaintiffs have also alleged claims of conversion, misappropriation, interference with contractual and business relationships, and breach of contract seeking to invoke pendent jurisdiction. There being no substantial federal claim, these other causes of action will also be dismissed for lack of jurisdiction.

The court has considered the mountainous stack of exhibits in reaching its decision, therefore it will give Rule 56, Fed.R.Civ.P., treatment to the Rule 12(b)(6) motion to dismiss. Although the granting of such motions in complex antitrust litigation is not favored, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962), the complexity of such litigation is often unnecessarily developed, and the court is convinced that there are no factual disputes in this case as to the few essential facts underpinning this decision. Those facts are as follows.

The American link on the Plaintiffs' side is Industrial Investment Development Corporation (IIDC), a Virginia corporation. IIDC is the beneficiary of a trust held by Lex LTD and Rex LTD. The corpus of the trust is the

Indonesia Industrial Investment Corporation Ltd. (IIIC), a Hong Kong corporation. IIIC wholly owns another Hong Kong corporation, Forest Products Corp. Ltd. (FPC) which is the principal actor in this Indonesian affair. These three corporations are the Plaintiffs in this suit.

Plaintiffs sought to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. The forests in Indonesia are owned by the Indonesian government. That government requires any foreign enterprise to form a joint venture with an Indonesian partner before it will be allowed to do business in Indonesia. This joint venture must then form an independent Indonesian corporation by which business must be conducted. However, the formation of these business alliances does not give anyone the right to begin the harvesting of the lumber. A concession or cutting license must be granted from the government through its Department of Forestry.

Pursuant to these governmental requirements, FPC entered into a joint venture with an Indonesian corporation, Telaga Mas Kalimantan Co. (Telega Mas). On July 1, 1971, FPC, Telaga Mas and the Indonesian Director General of Forestry entered into a Three Way Agreement by which terms were agreed upon as to the operating of the enterprise, *if* a cutting license were issued by the government. The Three Way Agreement provided for its own termination if no license issued. Ultimately no license was ever issued.

These facts are uncontroverted. Plaintiffs, however, would have the court shift its view from these facts to the more controversial allegations of conspiracy. Plaintiffs allege that the defendants infiltrated Telaga Mas executive suite [*sic*] and found a turncoat to poison the FPC-Telaga Mas marriage. Two shareholders meetings of Telaga Mas were

held. Regardless of their validity and fairness, it is undisputed that the first meeting ratified the Three Way Agreement while the latter invalidated the agreement. The battleground then switched to the Indonesian courts. The first two lawsuits upheld the validity of the second shareholders meeting and declared the Three Way Agreement unenforceable. The final lawsuit, however, resulted in a judgment that reversed the prior decision concerning the enforceability of the Three Way Agreement. In the meantime, the Director General of Forestry had cancelled the Three Way Agreement. Regardless of this cancellation and the ping-pong shareholders meetings and judgments, it is undisputed that a cutting license had never been and was never issued.

Plaintiffs contend that the poisoning of the FPC-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny FPC a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. This is the precise reasoning behind *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), where it was stated:

> "Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided

> would require judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.' 410 F.Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine."

Similarly, in *Occidental Petroleum Corp* v. *Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal. 1971), aff'd 461 F.2d 1261 (9th Cir. 1972), the court concluded that the foreign states' territorial aggressiveness which ousted the plaintiff from a concession was the ultimate cause of the damage complained of, and therefore was barred from judicial review stating:

> "There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, e.g., Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750-751 (9th Cir. 1936), cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937); Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 & n.1 (9th Cir), cert.den., 382 U.S. 958 86 S.Ct. 433, 15 L.Ed.2d 362 (1965), plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia,* that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of 'internal documents.' But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. *See Sabbatino, supra,* 376 U.S. at 423-424, 431-433, 84 S.Ct. 923."

Therefore, regardless of the proof offered by the Plaintiffs as to a conspiracy to break up the FPC-Telaga Mas joint venture, it is evident that the whole issue of such a conspiracy is irrelevant since the damage complained of stems directly from the denial of a governmental concession to cut timber. Any inquiry into the reasons for such denial is barred by the act of state doctrine. The recent U.S. Supreme Court case, *Alfred Dunhill of London* v. *Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854 (1976), does not help Plaintiffs' case. *Dunhill* merely excluded from the act of state doctrine those acts of a sovereign which are purely commercial in nature. The court reasoned:

> "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on national nerves." 96 S.Ct. at 1866.

The act in question here is the government denial of a concession to harvest logs which are owned by the government. This is not the type of act which *Dunhill* seeks to exclude as a purely commercial activity. Dunhill involved a plaintiff who paid funds to a Cuban government controlled corporation for the purchase of cigars. The cigar business was subsequently nationalized and the plaintiffs sued for the funds paid to the predecessor government controlled corporation. It was the failure to pay a commercial debt which the *Dunhill* court considered to be so entrepreneurial that the act of state doctrine would not apply. The same reasoning applies to *Timberlane Lbr. Co.* v. *Bank of America N.T. & S.A.,* 549 F.2d 597 (9th Cir. 1976), in which the act of state doctrine was not applied to an enforcement by Hondurian officials of a judicial decree by which commercial security interests held by defendants

were given recognition. It is the degree to which an American court must inquire into matters that turn on national political interests which triggers the act of state doctrine. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964). The denial of a concession to harvest government owned forests is a political, peculiarly governmental act of a sovereign. Perhaps the actions of the government in entering and terminating the Three Way Agreement may be considered commercial, proprietal acts, but the ultimate question as to the granting of the concession is purely a political issue barred from judicial review by the act of state doctrine.

The Plaintiffs had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such a privilege. The motivation for their ultimate denial cannot be the basis of an antitrust suit pursuant to American laws. Therefore, it is

ORDERED that Defendants' motion to dismiss construed as a motion for summary judgment is hereby GRANTED and Plaintiffs' complaint is in all things DISMISSED.

DONE at Houston, Texas, this 28th day of February, 1978.

/s/ Ross N. Sterling
United States District Judge

APPENDIX C

JUDGMENT

Of the
United States Court of Appeals
For the Fifth Circuit

April 25, 1979

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1775

D. C. Docket No. CA-75-H-1041

Industrial Investment Development Corporation, et al.,
Plaintiffs-Appellants,

v.

Mitsu & Co., Ltd. and
Mitsu & Co., (U.S.A.),
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before JONES, CLARK and INGRAHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 25, 1979

Jones, Circuit Judge, dissenting.

ISSUED AS MANDATE:

APPENDIX D

Notice of Order Denying Petition for Rehearing and Rehearing En Banc

July 6, 1979

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

JULY 6, 1979

Edward W. Wadsworth, Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-1775 — INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL. VS. MITSUI & CO., LTD. AND MITSUI & CO., (U.S.A.)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule

35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
By /s/ JULIE HARRISON
Deputy Clerk

cc: Mr. Fitzhugh H. Pannill, Jr.
Mr. B. J. Bradshaw
Mr. R. Hayden Burns

*Judge JONES dissents from the refusal of the panel to grant rehearing, for the reasons shown in his prior dissent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-552

MITSUI & CO., LTD., ET AL.,
Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CASES

IN THE

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Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., file this Brief opposing the Petition for a Writ of Certiorari filed by Mitsui and Co., Ltd. ("Mitsui Japan"), and Mitsui & Co. (U.S.A.) ("Mitsui USA"). Consistent with their status in the trial court, Petitioners will be referred to herein as "Defendants" while Respondents will be called "Plaintiffs".

QUESTIONS PRESENTED

DOES THE ACT OF STATE DOCTRINE PROHIBIT AN INJURED PLAINTIFF FROM SHOWING HE COULD HAVE QUALIFIED TO DO BUSINESS IN THE FOREIGN MARKET HE SOUGHT TO ENTER?

DOES THE ACT OF STATE DOCTRINE REQUIRE JUDICIAL ABSTENTION WHEN VIOLATIONS OF UNITED STATES LAW HAVE OCCURRED ON UNITED STATES' SOIL?

STATEMENT

With each new brief, Defendants' summary of the facts sounds more and more like *Hunt* v. *Mobil Oil Co.*[1] — but less and less like the case actually presented by the record and decided by the Court of Appeals. In their Petition the matters which Defendants omit from their "Statement" and ignore in their argument are not just important, but controlling. The injury in this case was the destruction of a valuable commercial enterprise by the direct action of an American and Japanese corporation, and their actions included violations of the United States' law on its own territory. The case does not involve, as Defendants suggest, an injury caused by the inducement or instigation of foreign governmental conduct.

Defendants' "Statement" is also plainly in error in its description of the decision of the Court of Appeals. That Court did not "explicitly reject" *Hunt* v. *Mobil Oil Co.*, as Defendants claim.[2] It distinguished *Hunt*, and reversed the trial court, because of the very facts Defendants omitted from their petition.

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[1] 550 F.2d 68 (2nd Cir.), *cert. denied* 432 U.S. 904 (1977).

[2] Petition for Writ of Certiorari ("Petition"), p. 6.

Since the significance of Defendants' editorial deletions can best be understood in context, Plaintiffs must briefly restate the events which are established by the record and which are the basis of the decision below.

In February of 1970, the Indonesian government awarded a substantial timber concession to P. T. Telaga Mas Kalimantan Company, an Indonesian corporation.[3] In December of 1970, Telaga Mas entered a formal agreement with Forest Products Corporation of Delaware, the American Plaintiff's corporate predecessor.[4] This agreement established an unincorporated joint venture which was to operate the northern three-fourths of Telaga Mas' concession and created a fiduciary relationship between Plaintiffs and Telaga Mas.[5]

The proposed joint operation required government approval, which was obtained on July 1, 1971, when the Indonesian government executed an agreement with the joint venture between Plaintiffs and Telaga Mas (described jointly as "the Company").[6] The July 1, 1971, agreement set forth the capital, organizational and other requirements which the Forest Products-Telaga Mas joint venture had to meet before actually beginning operations.[7] The July 1,

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[3] Industrial Investment Development Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 50 (5th Cir. 1979). Second Amended Complaint, ("Complaint"). §§ 26, 27, Rec. pp. 393, 394; see also Rec. No. 69, pp. 577-97. For explanation of references to the record, see "Note," Appendix A.

[4] 594 F.2d at 50; Complaint § 27, Rec. p. 393, Rec. No. 75, pp. 197-211.

[5] 594 F.2d at 50; Rec. No. 75, p. 197-211, Art III, § (7), (8), p. 201; Art IV § (3), p. 202; Complaint § 28, Rec. p. 393; Aff. of Gautama, § 4, Rec. No. 75, p. 159-160.

[6] 594 F.2d at 50; Complaint § 33, Rec. pp. 395, 396; Agreement of July 1, 1971, No. FA/J/031/VII/1971 ("July 1 Agr."), Rec. No. 75, pp. 212-25; Aff. of Gautama, § 5, Rec. No. 75, p. 160.

[7] 594 F.2d at 50; July 1 Agr, Art 5, 6, Rec. No. 75, p. 215.

1971, agreement also required the continued existence of that joint venture which was to perform the contract and receive a cutting license. Without the continued cooperation of the two private parties to the joint venture, the July 1 agreement could not be performed.[8]

The Mitsui Defendants were prior purchasers from and creditors of Telaga Mas.[9] They had known of the joint venture between Telaga Mas and Plaintiffs since at least February of 1971 and had no objection to it.[10] However, when timber prices increased, and large quantities of agathis timber were discovered on the joint venture's portion of the concession, the Mitsui Defendants decided to block the joint venture and place Telaga Mas' entire concession under Mitsui's supervision and control.[11] Defendants did not induce the government to cancel the concession; instead they acted independently and through private parties to make joint operation of the concession impossible.[12] In fact, the involvement of the Mitsui Defendants was kept a deliberate secret both from the government and from Plaintiffs.[13]

Defendants first encouraged Harianto, an officer of Telaga Mas and a named co-conspirator in this case, to

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[8] 594 F.2d at 50; Aff. of Gautama, § 5, Rec. No. 75, pp. 160-1.

[9] 594 F.2d at 50; Complaint § 30, Rec. p. 395; Mitsui-USA Amended Answers to Plaintiffs' First Set of Interrogatories, Nos. 9, 11, 26, Rec. pp. 497-98, 500-04, 507.

[10] Telex from Jakarta to Tokyo dated Nov. 5, 1971, Rec. No. 75, p. 91.

[11] 594 F.2d at 50; Complaint §§ 43-46, Rec. pp. 399-401; the evidence is summarized at notes 35 through 38, Brief of Appellants, p. 7.

[12] 594 F.2d at 50; for detailed references to the evidence, see Brief of Appellants footnotes 39-56, pp. 8-11, and accompanying text.

[13] 594 F.2d at 50; Telex from Tokyo to Jakarta dated May 10, 1972; Rec. No. 75, pp. 37-38; Telex from Tokyo to Jakarta dated March 31, 1972, Rec. No. 75, p. 42.

object to the July 1, 1971, agreement on the theory that Sadjarwo, the officer who had executed it on behalf of Telaga Mas, lacked authority to do so. A "shareholders' meeting" and two *ex parte* court decrees were used to bolster Defendants' position. Defendants finally arranged for their co-conspirator Harianto to purchase Sadjarwo's interest in Telaga Mas, to assume exclusive control of that firm, and to cause Telaga Mas to breach its agreement with Plaintiffs.[14] As Defendants recognize, this takeover by Defendants signalled the demise of the joint venture.[15] The Mitsui Defendants then gave Telaga Mas a $350,000 loan. The funds were furnished by Mitsui-USA, a New York corporation, which entered an exclusive-dealing agreement with Telaga Mas. After destruction of the joint venture, all production from the entire concession area was sold to the Houston, Texas, office of Mitsui-USA. The purchases were made with funds provided from American banks after receipt of shipping documents in Houston. The logs were then resold, at a profit, to Mitsui-Japan.[16]

During the year 1972 the Director General of Forestry attempted to mediate the dispute as to Telaga Mas' participation in the July 1, 1971, agreement. Harianto was persuaded by the Mitsui Defendants to "botch the whole talk by asking unreasonable demands."[17] In February of 1973, nearly a year after the destruction of the joint venture, the Director General finally "cancelled and affirmed invalid" the July 1 agreement.[18] He gave his reasons in the

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[14] 594 F.2d at 50; detailed references to the evidence are given in Brief of Appellants, fn. 42-56, pp. 8-11.

[15] In Defendants' opening brief in the Trial Court they stated that the buy out of Sadjarwo is "what really killed the deal for Plaintiffs." See Rec. No. 67, p. 25, fn. 73.

[16] See note 14, supra.

[17] Memo from Jakarta to Tokyo dated March 28, 1972, Rec. No. 75, pp. 46-48.

[18] Letter dated February 19, 1973, Rec. No. 75, p. 352.

cancellation letter: (1) the *ex parte* court decisions (later vacated) declaring the agreement not binding on Telaga Mas; and (2) the dispute between the officers and shareholders as to Sadjarwo's original execution of that agreement.[19] He did not "withdraw approval" either of Plaintiffs or of the proposed operation, however, and he invited the parties to execute a new agreement under the Foreign Investment Act.[20] Even after cancellation of the July 1 agreement, the Director General repeatedly confirmed that if the joint venture partners could resolve their differences, the proposed operation would be permitted.[21] However, despite the reversal of the *ex parte* decree declaring the July 1 agreement was not binding, Telaga Mas, now under Mitsui domination, still refused to honor its agreements or participate in the joint venture with Plaintiffs.[22]

REASONS THE WRIT SHOULD BE DENIED

(1) The Decision below was based on well-established principles and presents no new question for this Court's review.

Defendants seek Supreme Court review of this case in order to resolve a purely theoretical dispute as to whether the improper motivation of a foreign sovereign may serve as the basis of a claim when the legal invalidity of that sovereign's acts may not. The first reason that Defendants' petition should be denied is that the question they would have this Court answer is neither presented by the record nor the basis of the decision below. That decision resulted from the facts of this case, and those facts, although them-

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[19] *Id.*

[20] 594 F.2d at 6; Rec. No. 75, p. 352.

[21] State Department Memo dated, Nov. 20, 1975, Rec. No. 75, pp. 179-180. See Brief of Appellants, notes 72 and 73, pp. 15-16, and accompanying text.

[22] 594 F.2d at 6; Complaint § 61, Rec. pp. 407, 408.

selves complex, present no new question. The Court of Appeals refused to sustain Defendants' act of state defense because to do so would have required rejection of the principles of *Banco Nacional de Cuba* v. *Sabbatino*[23] and *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*,[24] and of the holdings of *United States* v. *Sisal Sales Corp.* [25] and *Continental Ore Co.* v. *Union Carbide Corp.*[26] The act of state doctrine does not apply here because *neither* the motivation *nor* the validity of a sovereign act is the basis of the dispute between these parties. On the contrary, that dispute arose wholly out of the destruction of a commercial entity by the unaided misconduct of private defendants, some of whose acts occurred within the United States itself.

(a) *No act of state issue is raised because Indonesia had no connection with the injury.*

The most efficient way to demonstrate the irrelevance of the Indonesian government — and of the act of state doctrine — to the instant dispute is by the comparison of two simplified examples.

In the first example, A attempts to start a taxicab business in a foreign country. To do so, he needs a driver's license, and applies for one. B, a competing cabdriver, bribes or otherwise persuades the licensing authority to deny A's license. Although it is a harsh result, it is established that A's suit against B would be barred by the act of state doctrine. E.g., *American Banana Co.* v. *United Fruit Co.*[26a]; *Hunt* v. *Mobil Oil Co., Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*[26b]

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[23] 376 U.S. 398 (1964), Cited and discussed by the Court of Appeals, 594 F.2d at 51-52.

[24] 425 U.S. 682 (1976), cited and discussed 594 F.2d at 52.

[25] 274 U.S. 268 (1926), cited and discussed 594 F.2d at 52-53.

[26] 370 U.S. 690 (1962), cited and discussed 594 F.2d at 53, 55.

[26a] 213 U.S. 347 (1909).

[26b] 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972).

Suppose, however, that B instead decides to block A's entry by simply running over him with a taxicab. A is paralyzed and can no longer drive a cab. The license bureau, neither involved in nor aware of B's misconduct, suspends A's license application for the express reason that he is no longer physically qualified for one. A sues B for damages resulting from his injury, including lost future earnings in the taxicab business. No case has ever allowed an act of state defense in this situation.

The second example is a perfect parallel to the case before this Court.[27] Here Defendants argue that they merely "induced" the Indonesian government to deny a license, but their "inducement" consisted of destroying the entity which was to receive that license. Here Defendants concede that, as in the second example, Plaintiffs' ability to do business had already been destroyed before the government did anything at all.[28] And here both Defendants and Plaintiffs concede that the Indonesian government has a perfect right to set whatever qualifications it wishes for doing business in that country and that after the injury Plaintiffs were no longer able to meet them.[29]

Defendants argued below that the act of state doctrine bars a suit against them for destruction of a private commercial enterprise without the aid, approval, or even knowledge of the foreign state. The argument ignores the crucial event — Defendants' destruction of Plaintiffs' busi-

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[27] Defendants argued below that the example involves a driver's license rather than a cutting license. Brief of Appellees, pp. 19-20. There is one difference: here Plaintiffs were "run over" within the United States.

[28] Rec. No. 67, p. 25, fn. 73.

[29] 594 F.2d at 53-54.

ness.[30] Defendants then confuse the "fact of damage" or injury with the measure of damages or value of the property injured, insisting that there was no injury to Plaintiffs (or to the taxidriver) until Plaintiffs failed to receive profits from the business Defendants had destroyed.[31] Finally Defendants extract from the opinion in *Hunt* v. *Mobil Oil Co.* the statements that the fact of damage could not be established in *that* case without also showing that the defendants had induced the nationalization of plaintiff's property and that *there* such a showing was barred by the act of state doctrine.[32] Defendants conclude that a government act which occurred in 1973 caused an injury which they admit occurred in 1972 and that *Hunt* therefore precludes recovery.

The Court of Appeals rejected Defendants' argument as to the requirements of Section 4 of the Clayton Act[33] because it was contrary to this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*[34]. Its decision on the act of state issue was instead based on an analysis of what had actually occurred and the established principles of the act of state doctrine.

The principles applied were derived from this Court's opinions in *Sabbatino* and *Dunhill.* The act of state doctrine, although not constitutionally compelled, has constitutional underpinnings. It rests upon the separation of powers in our system of government.[35] Cases in which the

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[30] Below Defendants' "Statement of Facts" ignored the nature, effect, and location of their anticompetitive acts altogether. See Brief of Appellees, pp. 5-14.

[31] For example, see Brief of Appellees, p. 26, where they state Section 4 requires that Plaintiffs prove "the *damages* they assert," including lost profits, to even establish a claim.

[32] *Eg.* Brief of Appellees, pp. 25-28.

[33] 15 U.S.C. § 15.

[34] 395 U.S. 100 (1969), cited and discussed at 594 F.2d 55.

[35] 594 F.2d at 51; quoting *Sabbatino* and *Dunhill.*

plaintiffs' claim requires passing on the validity of the sovereign acts of foreign governments create an unacceptable potential for interference with the executive's conduct of foreign relations and suggest the abstention of the judiciary.[36]

The decision of the Court of Appeals was that the factors which had required act of state abstention in other cases were absent here.[37] Plaintiffs' claim did not depend upon a judicial determination of the propriety, validity, or motivation of some government act.[38] The suit did not arise out of a nationalization of property.[39] Nor is it based on the inducement of improper governmental conduct.[40] Instead, Plaintiffs sought protection of their right to participate in American foreign trade without the direct predatory interference of private corporations.

The Court of Appeals recognized the vital distinction between an act of state situation and the case at bar, and the decision below was based on the crucial facts of this case: Defendants *did not* destroy Plaintiffs' business by inducing foreign state action; they *did* destroy it by their own direct misconduct.[41] This case simply does not revolve around what the Indonesian government did or why. Judging the propriety of the acts or policies of foreign nations is properly left to the Executive Branch, but this case does not involve that question either directly or by implication. The Court of Appeals found that it was not called upon to scrutinize the integrity of any governmental act, and, indeed, that "no ethical standard is set by which the propriety

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[36] 594 F.2d at 51.
[37] *Id* at 53.
[38] *Id* at 54-55.
[39] *Id* at 54.
[40] *Id* at 54-55, n. 11.
[41] *Id* at 52-54.

of Indonesia's decision is tested."[42] The decision below was not based on a semantic distinction between motivation and validity. The Court refused to apply the act of state doctrine because the factors which suggest abstention in deference to the Executive, and which are prerequisites of the act of state defense, are simply not present in the case at bar.

(b) *The occurrence of violations of American law within the United States precludes act of state abstention.*

The Court of Appeals in this case also noted that the *Sabbatino* opinion refuses to establish "an inflexible and all-encompassing rule,"[43] but instead "declared a less-brittle doctrine" capable of balancing executive and judicial concerns.[44] When the Court below balanced those concerns in the instant case, the result was particularly clear — for not only is the sensitive issue of validity notably absent, but there are very strong policy reasons which compel judicial action.

First, this is an antitrust action which involves two American corporations and which arises out of American foreign commerce, and "(t)he courts are an important forum for protection against competitive restraints."[45] Second, Plaintiffs seek redress for misconduct which occurred within the United States itself.[46] In giving controlling weight to these factors the court below properly followed the holdings of this Court in *United States* v. *Sisal Sales Corp.*[47] and *Continental Ore.* v. *Union Carbide.*[48] In *Sisal,* the defendants' attempt to establish a monopoly included procuring discriminatory foreign legislation. An act

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[42] *Id* at 55.
[43] *Id* at 51; *quoting Sabbatino,* 376 U.S. at 428.
[44] *Id.*
[45] *Id* at 55.
[46] *Id* at 53.
[47] 370 U.S. 690 (1962).
[48] 274 U.S. 268 (1926).

of state defense was denied because their conspiracy was not limited to the instigation of action by a foreign government, but included "violation of their [the United States'] laws within their own territory by parties subject to their jurisdiction . . . ."[49] In *Continental Ore*, the conspiracy involved the exclusive purchasing agent for the Canadian government. This Court again refused to apply the act of state doctrine, and for the same reasons.

> As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government. 370 U.S. at 706.

In the *Sisal* case, this Court found that the necessity of regulating the anticompetitive conduct of private parties, particularly on American soil, precluded act of state abstention even where the validity of foreign sovereign conduct was in issue. It is even more apparent that such a defense must be refused in the instant case since the issue of validity is not raised. In rejecting Defendants' act of state contentions, the Court of Appeals merely followed the established and inevitable precedents set by this Court.[50] To have done otherwise would be to allow a foreign sovereign to grant to private parties the right to disobey United States' law within the United States, a result which our courts cannot permit.

(c) *This case does not even involve conduct of a sovereign nature.*

Although the Court of Appeals did not reach the question, its decision is also supported by the fact that no action

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[49] 274 U.S. at 276.
[50] 594 F.2d at 51-53.

of the Indonesian government in this case was of the sovereign nature required for an act of state abstention. The July 1 agreement,[51] which establishes the nature of Indonesia's relationship to this case, contains an arbitration provision[52] and binding obligations on the part of the government.[53] Both by treaty[54] and by this agreement the Indonesian government elected to assume the burdens of a private party and to waive whatever immunity would otherwise be available. Even had it not made such an election, its actions related entirely to a dispute between private parties and were not of the public character necessary to establish an act of state defense.[55]

(2) This case does not present a conflict between the Circuits.

Because of important factual and legal differences, the court below properly distinguished the decision of the Second Circuit in *Hunt* v. *Mobil Oil Co.* That case arose out of the nationalization of the plaintiff's oil concession by the Libyan government. Two of the plaintiff's claims were directed to the independent misconduct of the defendant oil companies, and an act of state defense to those claims was refused.[56] The third claim was that the defendants had caused Libya's nationalization by the way they conducted negotiations. The plaintiff conceded he had not

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[51] July 1 Agr., Rec. No. 75, pp. 212-225.

[52] *Id* at 224. (art 17(3)).

[53] *Id* at 222. (Art. 14).

[54] Convention for Settlement of Investment Disputes, Mar. 18, 1965, 17 U.S.T. pt. 1, p. 1270, T.I.A.S. No. 6090.

[55] Aff. of Gautama, § 10, Rec. No. 75, pp. 166-169; *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976).

[56] Hunt v. Mobil Oil Co., 410 F.Supp. 10, (S.D.N.Y. 1976) aff'd 550 F.2d 68 (2nd Cir.), *cert. denied* 432 U.S. 904 (1977).

suffered any injury at all from the conspiracy itself.[57] He could establish "the fact of damage" only by showing that defendants had induced Libya's act and this necessarily raised the question of its validity.[58]

The only difference between *Hunt* and the other "inducement" cases is that Hunt sought to plead around the issue by alleging that defendants had induced a *valid* act. The differences between *Hunt* and this case, however, are numerous:

(i) In *Hunt*, the inducement of a government act had to be shown to establish any injury at all, i.e., the "fact of damage." Thus, if the injury was caused by a restraint, by implication that restraint had to be the act of Libya. In the instant case the government act is only relevant on the *measure* of damages and had no connection with the injury: "Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction."[59] Defendants sought to avoid this controlling distinction by arguing that the antitrust acts require a plaintiff to show the value of the property destroyed, or the measure of damages, to establish liability.[60] This argument was rejected by the Fifth Circuit as contrary to *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*[61]

(ii) The *Hunt* case does not involve an injury caused by the independent acts of private parties or misconduct within the United States. The decision of this Court in *Sisal*, therefore, was not controlling there. The *Hunt* court

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[57] 550 F.2d at 76.
[58] *Id* at 77.
[59] 594 F.2d at 54.
[60] See note 31, *supra*.
[61] 395 U.S. 100 (1969), discussed at 594 F.2d 16.

merely rejected an argument that the *Sisal* decision *abolished* the act of state doctrine.[62]

(iii) The *Hunt* case involved an expropriation of plaintiff's property in an openly political confrontation.[63] The instant case involved the failure of the government to issue a license under an agreement which Plaintiffs were prevented from performing by Defendants' misconduct.[64]

The Court below distinguished *Hunt* on the basis of these factual differences. All that the Court of Appeals "explicitly rejected"[65] was Defendants' analysis of that case — Defendants argued that the Court in *Hunt* intended to establish the very "inflexible and all-encompassing rule" which this Court has deliberately avoided.[66] Defendants insisted that the *Hunt* court intended to state, as universal rules, that motivation and validity are always the same, that a plaintiff must establish defendant's conduct as the sole cause of damage, and that the act of state doctrine precludes evidence as to the amount of damage. The Court of Appeals agreed with the *Hunt* decision, but concluded that if the language of the opinion was intended to support these doubtful propositions, it was not only dictum, but wrong.[67]

(3) This case is not sufficiently developed for Supreme Court review and a decision on the act of state issue would not dispose of the litigation.

Although the act of state doctrine is a "vital tool of judicial abstention in the field of foreign relations,"[68] its

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[62] 550 F.2d at 74.
[63] See 594 F.2d at 55, note 11.
[64] 594 F.2d at 54.
[65] Petition, p. 6.
[66] 376 U.S. at 428.
[67] 594 F.2d at 54-55.
[68] *Id* at 55.

results are often harsh, and neither the judicial, legislative nor executive branches have shown any inclination to enlarge its scope. By their petition, Defendants ask a major revision and expansion of this defense. They argue that it should be construed as a mandatory evidentiary rule, and that it should provide immunity for conduct in violation of the antitrust laws occurring within the United States. Moreover, Defendants ask that this Court undertake this major policy revision in the middle of a complex lawsuit, not only before a trial, but before Defendants have been deposed.

Plaintiffs submit that such a radical alteration in precedent should not be undertaken when so many related issues remain undeveloped. In addition, a ruling by this Court on the act of state defense is not necessary for further decision of the case, and would not be dispositive of the litigation. Defendants conceded in the court below that even under their theory, the defense would not apply to the Plaintiffs' tort claims,[69] of which the federal courts have both pendent and diversity jurisdiction. Thus, a grant of certiorari at this time would require decision of important policy matters on an incomplete record, would preclude the decision by this Court of other complex issues not yet sufficiently developed, and would impede rather than aid a final disposition of the litigation.

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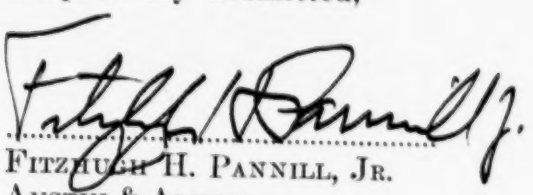
[69] Brief of Appellees, pp. 3, 4, 25, 26.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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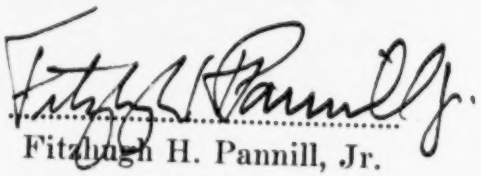
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been delivered to the attorney for Petitioners, Mr. B. J. Bradshaw, Fulbright and Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on November 2, 1979.



Fitzhugh H. Pannill, Jr.

APPENDIX A

NOTE ON RECORD REFERENCES

Plaintiffs have used the same record references used in the Court of Appeals except that descriptions of the documents ("Plaintiffs' Trial Appendix", etc.) are usually deleted. Where the evidence involves a large number of documents, the Court is referred to the "Statement of Facts" in the Brief of Appellants, which contains a much more detailed factual treatment than is possible here.

Documents which have been included in the bound record will be referred to by the District Clerk's page numbers. All other documents are referred to by the exhibit number assigned by the District Clerk ("Rec. No."). The bulk of the relevant evidence in this case is from the business records of the parties and witnesses, which were submitted to the trial court in the form of appendices to the trial briefs. The pages of Defendants' appendix are numbered consecutively with numbers prefixed by the letter "A," and are referred to as "Def. Trial App. p.A . . .," etc. Pages in Plaintiffs' Trial Appendix are numbered consecutively without a letter prefix. Numbers on documents which begin with any letter other than "A" refer to the production numbers assigned by counsel for the business records of various parties and witnesses: F — Plaintiffs; J — Mitsui-Japan; U — Mitsui-USA; S — U.S. State Dept.; E — U.S. Export and Import Bank; W — Wheat First Securities.

No. 79-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

The petition for a writ of certiorari presents the question whether the Act of State Doctrine permits a court of the United States to inquire into the conduct of a foreign government for the purpose of determining the actual reasons and motives for official acts. Respondents apparently concede that the Act of State Doctrine bars such inquiry, for in their brief in opposition they avoid any discussion of the merits. Instead, respondents argue (1) that the question presented in the petition is not actually raised by this case, Br. in Opp. at 6-13, and (2) that the decision below does not create a conflict among the courts of appeals, Br. in Opp. at 13-15. This reply memorandum is submitted to address these two arguments, neither of which has any merit.

1. Although for obvious tactical reasons respondents choose to characterize them as "complex," Br. in Opp. at 7, the essential facts of this case actually are quite simple. In 1970, respondents entered into a joint venture agreement with Telaga Mas for the conduct of a logging business. Pet. App. A, at 4a. In 1971, the Indonesian government entered

into a forestry agreement with the joint venturers. *Id.* The government subsequently cancelled the forestry agreement. *Id.* at 6a. Cancellation of the forestry agreement "automatically terminate[d] any rights of the parties to conduct lumbering operations." *Id.* at 5a.

In this lawsuit, respondents contend that their joint venture with Telaga Mas somehow was "destroyed" by petitioners even before the Indonesian government cancelled the forestry agreement. Br. in Opp. at 5. This contention, however, is erroneous as a matter of law: The joint venture agreement remained valid and enforceable under Indonesian law long after the government had cancelled the forestry agreement. Pet. App. A, at 6a; Pet. App. B, at 21a. In other words, the joint venture itself was not destroyed; what was destroyed was the joint venture's economic viability. And that was destroyed not by petitioners but by operation of law, *i.e.*, by the Indonesian government's cancellation of the forestry agreement, its refusal to re-enter such an agreement, and its determination not to issue a cutting license and logging concession. It therefore is plain that foreign acts of state lie at the heart of this case.

For purposes of the application of the Act of State Doctrine, however, the case really is no different even if one takes at face value respondents' contention that petitioners destroyed the joint venture. The difficulty for respondents is that the joint venture had no value apart from the profits that allegedly would have been derived from its operation of the proposed logging business. See Pet. at 9 n. 8. And as the court of appeals recognized, in order to recover for such alleged lost profits, "[respondents] must show a causal relationship between [petitioners'] anticompetitive actions and the harm suffered." Pet. App. A, at 16a. In other words, respondents must show that *but for* petitioners' alleged conspiracy the Indonesian government

would have honored the forestry agreement and issued the cutting license and logging concession, because it is undisputed that no trees could have been cut, nor profits derived, absent these required, discretionary, governmental approvals.

As a practical matter, what this means is that at trial respondents would be required not only to show why the Indonesian government cancelled the forestry agreement and refused to issue the license and concession, but also to show what the government would have done with respect to the joint venture in the absence of petitioners' alleged conspiracy. As the court of appeals understood, such a showing would entail "inquiry into the motivation behind or circumstances surrounding the sovereign act." *Id.*

Respondents here attempt to suggest that no such inquiry even is necessary. The respondents would have this Court accept as proven, or established, the motivation of the Indonesian government as merely alleged by respondents, *i.e.*, that the failure or refusal of that government to grant the required discretionary approvals was indeed caused by petitioners' alleged acts. But this is a factual issue that would have to be adjudicated in this case. The district court cannot simply accept without proof respondents' allegation that the Indonesian government was motivated in a certain way.[1]

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[1] It follows that respondents' "taxicab analogy," Br. in Opp. at 7-8, is inapt: That analogy assumes the very factual issue that would have to be adjudicated here, *i.e.*, whether the governmental action was motivated by the defendant's acts. It may be that the process of reviewing applications for drivers' licenses is so routine and ministerial that, in the hypothetical offered by respondents, the agency's motivation could safely be assumed. In the instant case, however, the license to harvest a vast tract of forest land depended on the making of *discretionary* decisions by various high governmental officials in the implementation of national policy regarding the exploitation of cherished state-owned forest reserves. *See* Pet. App. A, at 3a-4a; Pet. App. B, at 24a.

Recognizing that judicial inquiry into the reasons and motives underlying the Indonesian government's acts was in prospect, the court below nevertheless explicitly rejected petitioners' argument that such an inquiry would be barred by the Act of State Doctrine.[2] Instead, the court explicitly ordered that upon remand respondents must be allowed to "question [the Indonesian] government's motivation to the extent of measuring [their] damage." Pet. App. A, at 17a. It is plain, therefore, that this case directly raises the question presented in the petition, *i.e.*, whether the Act of State Doctrine permits a court of the United States to inquire into the conduct of a foreign government for the purpose of determining the actual reasons and motives for official acts.[3]

Under facts closely analogous to those here, the district court in Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977), dismissed on act-of-state grounds an antitrust case charging defendant with causing the denial of an import license sought by plaintiff:

> ". . . [T]his Court cannot see how the case at bar can be resolved without an inquiry into why the Brazilian government acted as it did in denying the licenses. Such an inquiry would necessarily have to include the question of whether Grumman, directly or indirectly, improperly influenced that decision. The answer to that question easily might 'embarrass the Executive Branch of our Government in the conduct of our foreign relations.' *Dunhill, supra,* 425 U.S. at 697. . . . For this reason this case is within the act of state doctrine and is non-justiciable.

432 F. Supp. at 333.

[2] Acknowledging that the Act of State Doctrine bars inquiry into the validity of a foreign sovereign act (*see, e.g.*, Pet. App. A, at 7a n. 6), the court "disagree[d] that motivation and validity are equally protected by the act of state rubric." *Id.* at 16a. The decision below thus squarely rests upon the distinction between motivation and validity, a distinction that respondents accurately characterize as merely "semantic." Br. in Opp. at 11.

[3] Respondents argue that the mere allegation that violations of United States law occurred within the United States renders the Act of State Doctrine inoperative (Br. in Opp. at 11-12). This argument is in direct conflict with Hunt v. Mobil Oil Co., 550 F.2d 68 (2d Cir.), *cert. denied,* 432 U.S. 904 (1977), where

Notwithstanding respondents' suggestion to the contrary, Br. in Opp. at 15-16, this is the most appropriate point in the lawsuit for consideration and definitive resolution of this question.[4] If this Court does not intervene, the district court will be forced to determine the Indonesian government's motivation and thereby risk an affront to the foreign sovereign, and the interference with foreign affairs, that the Act of State Doctrine is designed to avoid.

2. It was pointed out in the petition that the decision below conflicts with both *Hunt* v. *Mobil Oil Co.* and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 461 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). Respondents apparently concede the conflict with *Occidental Petroleum*, arguing only that there is no conflict with *Hunt*. But the decision below plainly conflicts with *Hunt* as well.

It is remarkable that respondents find no conflict between the decision below and *Hunt*, for the Fifth Circuit's re-

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the Act of State Doctrine was held to apply even though many of the alleged conspiratorial acts took place within the United States. *See* 550 F.2d at 71.

Respondents' argument that the Indonesian government's initial entry into the forestry agreement was not a sovereign act, Br. in Opp. at 12-13, is both incorrect and irrelevant. The forestry agreement represented a noncommercial determination by the government concerning the extent to which a valuable, depletable natural resource could be privately exploited. *See* Pet. at 11 n. 14. In any event, the acts of state at issue here are the Indonesian government's cancellation of the forestry agreement, its refusal to re-enter such an agreement with the joint venturers, and its determination not to issue a logging concession and cutting license. *See* Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. at 334.

[4] Contrary to the assertions of respondents (Br. in Opp. at 16), a ruling by this Court upholding the Act of State defense *would* be dispositive of this litigation, for the district court has already exercised its discretion to dismiss the pendent claims. *See* Pet. App. B, at 19a; Pet. App. A, at 2a. There is no diversity jurisdiction in this case, since there is an alien on each side of the controversy. 1 Moore's Federal Practice ¶ 0.75 [1. — 2] at 709.6 (2d ed. 1972).

pudiation of *Hunt* is explicit and dispositive on the very point upon which this petition turns, *i.e.*, whether an American court can determine the reasons and motives underlying foreign official acts. In denouncing *Hunt*, the court below stated, "[W]e disagree that motivation and validity are equally protected by the act of state rubric." Pet. App. A, at 16a. Hence, issue is joined between the Second and Fifth Circuits on a legal question of international significance. This Court should resolve that conflict.[5]

Respondents offer three purported distinctions between this case and *Hunt*. First, respondents argue that whereas in *Hunt* the inquiry into motivation would have been made to determine the "fact of damage," here the inquiry will be made only to establish the measure of damages. Br. in Opp. at 14. Even if this were true,[6] it would be a distinction without a difference. The purpose of the Act of State Doctrine is to guard against embarrassment of foreign sovereigns and interference with the conduct of foreign policy. That purpose is frustrated by any judicial inquiry into the motives underlying a foreign official act. It is the *fact* of the inquiry, not the *reason* for it, that implicates the Act of State Doctrine.

Second, respondents argue that *Hunt* did not "involve an injury caused by the independent acts of private parties." Br. in Opp. at 14.[7] That proffered distinction is rebutted by Hunt's own submission to this Court:

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[5] On the related question of establishing liability, the court below was equally explicit in its rejection of *Hunt*: "We do not agree that in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's [*sic*] acts were the sole cause of the injury." Pet. App. A, at 16a.

[6] Respondents' argument is based upon the shaky assumption that respondents can show injury apart from a loss of profits from the proposed logging business. *See* pp. 2-3, *supra*.

[7] Respondents also incorrectly state that *Hunt* involved no allegation of misconduct within the United States. *See* n. 3, *supra*.

> The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises that were made to be broken. *They damaged Hunt wholly apart from the nationalization* . . . .

Petition for a Writ of Certiorari in *Hunt*, at 24-25 (No. 76-1403) (emphasis added). *See also* Pet. at 9 n. 9.

Third, respondents rely upon the fact that *Hunt* involved nationalization rather than, as here, exclusion of a firm from the national marketplace. Br. in Opp. at 15. That distinction, however, does not justify a difference in result. A foreign state's refusal to permit a firm to conduct business within the state, no less than its expropriation of a firm's property, is an official act of state entitled to the protection of the Act of State Doctrine. In *Occidental Petroleum*, for example, the Act of State Doctrine was held to bar inquiry into why a foreign sovereign had terminated a right to conduct business within the state. *See* 331 F. Supp. 92, 99-101 (C.D. Cal. 1971).

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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No. 79-552

In the Supreme Court of the United States

OCTOBER TERM, 1979

MITSUI & CO., LTD., ET AL., PETITIONERS

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of November 26, 1979.

QUESTION PRESENTED

Whether the act of state doctrine precludes courts of the United States from inquiring into the purpose or intent of actions of a foreign sovereign to ascertain damages resulting from federal antitrust

violations when there is no challenge to the legality or validity of the foreign sovereign's actions.

STATEMENT

1. Pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, respondents sought treble damages from petitioners for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C. 8. The litigation resulted from unsuccessful efforts by respondents to enter the logging and lumber business in Indonesia. That country's Foreign Capital Investment Act restricts the business opportunities of foreign private entrepreneurs (Pet. App. 3a). It requires a foreign company, as a precondition to conducting business in Indonesia, to establish a joint venture company with a local business partner (*ibid.*). Known as "P.T.'s," these joint venture enterprises must obtain the approval of the Indonesian government before commencing operations (*ibid.*).

The Foreign Capital Investment Act also regulates the exploitation of state-controlled lands. An approved P.T. cannot harvest timber from such lands until it receives a concession and cutting license from Indonesia's Department of Forestry (*ibid.*). The procedure for obtaining the license requires preliminary surveys and negotiations between the applicant and the Director General of Forestry, resulting in tentative concession rights incorporated in a Forestry Agreement (*ibid.*). The Agreement, accompanied by

an Application Letter from the P.T., must then be submitted to the Minister of Agriculture (Pet. App. 3a-4a). If the application is approved and a concession fee paid, the Director General of Forestry issues a formal concession and a license that authorize logging operations consistent with the Forestry Agreement (*id.* at 4a).

In 1970, respondent Industrial Investment signed a joint venture agreement with Telaga Mas, an Indonesian company, to harvest logs from Telaga Mas' timber concession in a government-owned forest (*ibid.*). During the first half of 1971, the joint venture partners negotiated with the Indonesian government to obtain approval for the proposed logging business. The negotiations resulted in a Forestry Agreement signed by Industrial Investment, Telaga Mas, and the Director General of Forestry (*ibid.*). The Department of Forestry was empowered to cancel the Agreement if the joint venture companies failed to cooperate or fulfill their obligations (Pet. App. 5a). The Agreement also provided that cancellation of the joint venture arrangement prior to the issuance of the license certificate would automatically terminate any rights of the parties to engage in lumbering operations (*ibid.*).

Respondents' complaint alleged that the Mitsui petitioners infiltrated and usurped control of Telaga Mas in order to eliminate competition by destroying respondents' interest in the prospective logging concession (*ibid.*). Conspiratorial acts by petitioners allegedly resulted in Mitsui's affiliates obtaining con-

trol of Telaga Mas and also led to the annulment of the joint venture agreement with respondents (Pet. App. 5a-6a). Advised of the annulment, the Director General of Forestry informed respondents and Telaga Mas that their tripartite Forestry Agreement was cancelled and invalid, but invited the parties to reapply if they could overcome their disagreement (*id.* at 6a). The theory of respondents' antitrust complaint was that frustration of the joint venture by petitioners caused the cancellation of the Forestry Agreement which in turn caused the Indonesian government to deny the logging concession (*ibid.*). Respondents sought recovery of damages for the destruction of this commercial opportunity.

2. The district court granted summary judgment for petitioners, relying on the act of state doctrine (Pet. App. 18a-24a).[1] The business injury for which respondents sought redress, the district court concluded, was ultimately caused by the Indonesian government's failure to grant a cutting license to harvest logs (*id.* at 21a). The act of state doctrine, it maintained, foreclosed judicial inquiry into the "motivation" behind that failure (*ibid.*). Accordingly, the district court held that the doctrine precluded any

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[1] Petitioners also moved to dismiss the complaint on four other grounds: (1) lack of standing; (2) insufficient connection with American commerce or interests to justify application of the antitrust laws; (3) failure of respondents to fall within the "target area" protected by the antitrust laws; and (4) forum non conveniens (Pet. App. 18a-19a). Neither the district court nor the court of appeals considered the merits of these defenses, and they are not before this Court.

evidence that might be tendered by respondents to show that the alleged antitrust conspiracy was the cause of Indonesia's denial of the timber concession (*id.* at 23a).[2]

A divided panel of the court of appeals reversed and remanded (Pet. App. 1a-17a). The court explained that this Court's decisions in *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), declined to immunize antitrust conspiracies simply because their success was partially attributable to the procurement of foreign legislation or other action by foreign officials (Pet. App. 9a-11a). Adjudication of the antitrust claims of respondents, the court noted, would not require an inquiry into the propriety or validity of Indonesia's failure to issue a cutting license (*id.* at 11a-13a). Indonesia's actions were relevant only to the measurement of damages resulting from the alleged conspiracy (*id.* at 13a-14a). Insofar as this inquiry might extend to the motivation of the Indonesian government, the court concluded, neither the act of state doctrine nor its policies would be infringed (*id.* at 14a-17a). In so holding, the court of appeals expressly rejected the position of the Second Circuit in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, cert.

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[2] The district court also concluded that denial of the timber concession did not fall within the "commercial act" exception to the act of state doctrine as expounded in *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682 (1976) (Pet. App. 23a-24a). The court of appeals did not address that issue (*id.* at 9a).

denied, 434 U.S. 984 (1977), which held that inquiry into the motivation of foreign government actions inevitably calls into question the validity of those actions and thus is impermissible under the act of state doctrine (*id.* at 15a-16a).

INTRODUCTION AND SUMMARY

We believe that the court of appeals' decision is correct, but nonetheless urge that the petition for a writ of certiorari be granted. The decision raises important questions concerning the breadth of the act of state doctrine generally and its application to the antitrust laws in particular that have produced conflicts among the lower federal courts. The growing importance of international trade and investment to the Nation's economy and the participation of foreign governments in those transactions underscore the need for a clear and authoritative exposition of the act of state doctrine.

The decisions in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, *United States* v. *Sisal Sales Corp.*, *supra*, and *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), have created uncertainty whether the act of state doctrine forecloses antitrust plaintiffs from inquiring into the purpose behind a foreign government's official acts.[3] In this case, a divided panel of the

[3] We submit that a distinction should be drawn between the validity of action by a foreign government and the purposes behind that action. The use of the word "motive" by lower federal courts, as opposed to purpose, to make this dis-

Fifth Circuit viewed the doctrine as limited to precluding inquiry into the validity of foreign sovereign action. The court of appeals expressly disagreed with the decision of the Second Circuit in *Hunt* v. *Mobil Oil Corp.*, *supra*, which embraced a more sweeping definition of the act of state doctrine that would foreclose judicial inquiry into the reasons that prompted foreign government action even though the validity of that action was not questioned. The decisions of the Ninth Circuit also differ over whether the act of state doctrine bars judicial inquiry into the purpose underlying the official acts of foreign governments.[4]

We submit that while judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the validity or legality of foreign government actions. In the present case, respondents' antitrust claims can be substantiated, if valid, and recoverable damages

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tinction confuses the act of state analysis. As this Court has acknowledged, searching for the "motive" of government action, ordinarily resulting from the interaction of several persons and institutions, is elusive at best and raises the conceptual problem of choosing among the varied subjective motivations of the participating officials. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968).

[4] Compare *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 110 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972), with *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-608 (9th Cir. 1977).

fully measured, without questioning the validity or legality of the Indonesian government's actions.[5]

DISCUSSION

1. The importance of international trade and investment to the Nation's economic vitality has increased substantially in the last decade. In fiscal year 1978, the United States exported approximately $220 billion and imported approximately $230 billion worth of goods and services, which in the aggregate constituted approximately 20% of the Nation's Gross National Product.[6] At present, United States firms have direct investments abroad valued at approximately $170 billion. Foreign governments and state enterprises are every-day participants in these international dealings. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 7 (1976), prepared in connection with Congress' consideration of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602, *et seq.*

An essential catalyst to international commercial transactions is an orderly and predictable body of

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[5] We express no view on respondents' ability to prove their antitrust claims or alleged damages at trial or on any factual or other legal defenses petitioners might raise. The absence of record evidence precludes evaluation of such issues at this time. In any event, as this Court has often stated in antitrust cases, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976); *McLain* v. *Real Estate Board of New Orleans*, No. 78-1501 (Jan. 8, 1980), slip op. 13.

[6] *1979 Economic Report of the President*, Table B-1.

legal principles to govern potential disputes. See *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 433-434 (1964). Uncertainty regarding the doctrine of foreign sovereign immunity, bottomed on the same policies as the act of state doctrine (see *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 762-763 (1972)), prompted cooperative efforts by Congress and the executive branch to codify the scope of immunity accorded to foreign sovereigns in the Foreign Sovereign Immunities Act of 1976. See H.R. Rep. No. 94-1487, *supra*, at 6, 8-9. The corrective purposes of that Act will be partially undermined, however, if judicial conflicts persist regarding the cognate act of state doctrine.

2. In its most recent pronouncements, this Court has noted that the act of state doctrine "precludes the courts of this country from inquiring into the *validity* of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 401 (emphasis supplied). See also *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion of Mr. Justice White); *First National City Bank* v. *Banco Nacional de Cuba*, *supra*, 406 U.S. at 767 (plurality opinion of Mr. Justice Rehnquist).[7] The Court has justified this self-

[7] See also *Restatement (Second) of Foreign Relations Law of the United States* § 41 (1965): "[A] court in the United States * * * will refrain from examining the *validity* of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests" (emphasis supplied).

imposed doctrine of judicial abstention (see *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion)) on two grounds: (1) the absence of settled or ascertainable legal standards by which the validity of a foreign state's public acts may be measured; and (2) the risk that a judicial declaration of the validity or invalidity of the acts of a foreign state may conflict with the positions of the political branches and thus interfere with or embarrass the conduct of foreign relations by those branches. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at 423, 428-430; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 765-768 (plurality opinion).

Even when such considerations are present, however, they do not always preclude adjudication of a case. Because the act of state doctrine rests on principles of judicial abstention rather than on jurisdictional or constitutional grounds, it constitutes a limited exception to the ordinary obligation of courts to adjudicate cases and controversies over which they have jurisdiction. See *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion). This Court therefore has concluded that the doctrine should be applied in a flexible fashion, in recognition of the fact that the capacity of courts to resolve certain issues and the risk of embarrassment or interference with the conduct of foreign relations vary according to the issues and circumstances presented in each case. See *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. at

428; *First National City Bank* v. *Banco Nacional de Cuba, supra,* 406 U.S. at 763 (plurality opinion). Moreover, Congress, in limiting the scope of the *Sabbatino* decision, has indicated a preference for a narrow application of the act of state doctrine. See 22 U.S.C. 2370(e)(2).

It is possible (though we deem it unlikely on the apparent facts of the present case) that judicial inquiry into the purpose behind the Indonesian government's act of withdrawing approval of the joint venture agreement would have the potential to embarrass that government and to affect our government's conduct of foreign relations. However, while the existence of potential embarrassment requires caution, it does not, standing alone, compel an application of the act of state doctrine or otherwise require the courts to abstain from adjudicating a dispute.

None of this Court's decisions suggest that the act of state doctrine precludes all judicial inquiries that may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning pur-

pose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied.[8]

3. This Court's more recent decisions in the antitrust context decline to apply the act of state doctrine when the validity of a foreign sovereign's conduct is not called into question.[9] In *United States* v. *Sisal Sales Corp.*, *supra*, the Court upheld a complaint that alleged that the defendants had conspired to monopolize and restrain trade by, *inter alia*, securing favorable legislation in Mexico. Following *Sisal Sales*, the Court in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, upheld an antitrust complaint

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[8] A complaint that requires proof of the purpose underlying a foreign government's act may raise substantial problems of proof. See Pet. App. 19a; cf. Fed. R. Civ. P. 44.1. But the possibility of such problems is not a sufficient reason to prevent the plaintiff from attempting to present competent evidence. As this Court noted in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 697, 700-701, the jury may be permitted to draw appropriate inferences concerning causation from circumstantial evidence.

[9] The political question doctrine, however, might justify judicial abstention in cases that could cause intense embarrassment to a foreign state or improperly inject the courts into the formulation or execution of the Nation's foreign policy. See *Baker* v. *Carr*, 369 U.S. 186, 211-213, 217 (1962); *Goldwater* v. *Carter*, No. 79-856 (Dec. 13, 1979) (plurality opinion of Justice Rehnquist).

that alleged that the defendants had conspired to establish an exclusionary customer allocation program for sales of vanadium in Canada that had been instituted and controlled by an agent of the Canadian government. The Court stated (370 U.S. at 706):

> What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental [Ore] from the Canadian market. As in *Sisal*, * * * respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

The holdings in *Sisal Sales* and *Continental Ore*, however, seem irreconcilable with Mr. Justice Holmes' early exposition of the act of state doctrine in *American Banana Co.* v. *United Fruit Co.*, *supra*. There, the Court upheld the dismissal of an antitrust complaint that alleged that the defendant had caused the government of Costa Rica to seize the plaintiff's property for the purpose of eliminating it as a competitor. The Court held that the antitrust laws do not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions of this Court. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 704. Justice Holmes further supported the Court's decision by reliance on act of state principles (213 U.S. at 358):

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

This broad reasoning would insulate from judicial scrutiny anticompetitive schemes that are effectuated by procuring a foreign sovereign act even though the case may be resolved under the antitrust laws without questioning the validity of the act under international law or otherwise. To this extent, the reasoning has not survived the decisions in *Sisal Sales* and *Continental Ore*, and extends beyond the ambit of the act of state doctrine as expounded in *Banco Nacional de Cuba* v. *Sabbatino*, *supra*; *Alfred Dunhill of London* v. *Republic of Cuba*, *supra*; and *First National City Bank* v. *Banco Nacional de Cuba*, *supra*. Nevertheless, this Court never has explicitly so stated, and *American Banana* was cited in *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, 376 U.S. at 416, as a case "directly or peripherally" involving the act of state doctrine.

4. The apparent inconsistency between *American Banana* and subsequent decisions of this Court has engendered conflicts and uncertainty among the lower courts. In *Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976), the plaintiff alleged that the defendants (producers of crude oil in Libya) had manipulated oil negotiations with the Libyan government and

pursued a course of action that caused Libya to nationalize the property of plaintiffs and terminate their production of Libyan crude oil. The district court dismissed their antitrust complaint, reasoning that adjudication of the dispute "would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies," and that such an inquiry is precluded by the act of state doctrine. 410 F. Supp. at 24. A divided panel of the Second Circuit affirmed. It noted that resolution of the antitrust claims would necessitate an inquiry into the motives for the Libyan government's expropriation, and insisted that inquiry into the "motivation of the Libyan action * * * inevitably involves its validity" (550 F.2d 68, 77). As Judge Van Graafeiland correctly pointed out in dissent, however, the plaintiff's injury could have been established by proof that the expropriation of their property was caused by the alleged anticompetitive conduct without passing judgment on whether the expropriation was valid. 550 F.2d at 80. See also Brief for the United States as Amicus Curiae in *Hunt* v. *Mobil Oil,* No. 76-1403, at 11. The majority in *Hunt* reasoned that the act of state doctrine shields from judicial scrutiny all private misconduct that inflicts injury by causing official action of a foreign government, since proof of the requisite causal link between the damage and the violation requires an examination of the purpose of such official action (550 F.2d at 77-79).

This interpretation clashes with that of the Fifth Circuit panel in this case. Here, a 2-1 majority dis-

agreed with the Second Circuit's view "that motivation and validity are equally protected by the act of state rubric" (Pet. App. 16a). Holding that the act of state doctrine does not foreclose inquiry into a foreign government's purpose when relevant to the measurement of antitrust damages, the majority explained (*id.* at 16a-17a):

> Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.

The issue whether the act of state doctrine forecloses judicial examination of the purpose underlying official acts of foreign governments has also produced disparate approaches within the Ninth Circuit. In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir. 1972), the court, relying on *American Banana*, expressed an unwillingness to make any inquiry into the motivation underlying foreign sovereign action.[10] In *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977), however, the court declined to find that the act of state doctrine barred a complaint that alleged, *inter alia*, that the defendants had used Honduran judicial process for anticompetitive purposes to injure the plaintiff.

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[10] The controversy in the *Occidental Petroleum* case subsequently arose in the courts of the United Kingdom. The judges of the Court of Appeal, Civil Division, came to a conclusion contrary to that of the Ninth Circuit concerning the application of the act of state doctrine. See *Buttes Gas and Oil Co.* v. *Hammer*, [1975] 2 All E.R. 51.

In sum, this case warrants review to clarify the act of state doctrine and to dispel the conflict among the lower federal courts as to whether the purpose underlying the official acts of foreign governments can be judicially ascertained when the validity of those acts is not questioned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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